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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

v.

WISCONSIN ex rel. BRONSON C. LAFOLLETTE, and
DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR AMICI CURIAE

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QUESTION PRESENTED

Does the State of Wisconsin's decision not to demand that its citizens publicly declare and record their fealty to the Democratic Party before they may cast their vote for a Democrat in that state's presidential primary unconstitutionally deprive the Democratic Party of its freedom to associate?

STATEMENT OF INTEREST OF AMICI CURIAE

Like Wisconsin, the State of Washington does not require that a citizen publicly declare his affiliation with a party before he is allowed to vote for that party's candidates in a primary election. According to WASH.REV.CODE 29.18.200,

> "[a]ll properly registered voters may vote for their choice at any primary election, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."

This system was created by the people through the initiative process and has since enjoyed the support of an "overwhelming" majority of the citizens of Washington. *See* Ogden, *Washington's Popular Primary,* Research Studies of the State College of Washington 139, 144 (Sept. 1951). The statute encourages broad voter participation and lessens the control over the nominating process by small, but disciplined cadres of party professionals. The Supreme Court of Washington recently held that this statute does not unconstitutionally restrict the freedom of association guaranteed by the First and Fourteenth Amendments. *Heavey v. Chapman,* 93 Wash.2d 700, 611 P.2d 1256 (1980).

Although Washington does not have a presidential primary, the Wisconsin and Washington primary election statutes serve similar interests and have been subjected to similar challenges on associational grounds. *Cf. Heavey v. Chapman, supra.* The interest of the State of Washington in this action stems from its interest in preserving its own popular and smoothly functioning method of conducting primary elections.

The people of Montana are traditionally independent minded, particularly with regard to their political beliefs. Montana has a long tradition with the "open primary" system. Montana allows its citizens to vote in primary elections without a public declaration of party affiliation. Electors do not register by party. However, under the provision of Section 13-10-301(2), MONT.CODEANN., elec-

tors may choose from the candidates of only one political party at a single election. The election procedures insure that a voter cast his ballot in only one party primary.

Montana does have a presidential primary. However, Section 13-10-407, MONT.CODEANN., provides that the use of the primary results are discretionary with each political party. In other words, the method of selection of delegates to national presidential nominating conventions is set by party rules. Like Wisconsin, in 1980 the Democratic Party in Montana based its delegate selection process on the results of the primary, a policy which violates the rules of the Democratic National Committee at issue here.

This brief is submitted by amici curiae in support of the position of the State of Wisconsin.

SUMMARY OF ARGUMENT

The open primary, instead of imposing a burden on freedom of association, in fact enhances that freedom to a much greater extent than does the closed primary. The open primary preserves the secrecy of the ballot, encourages participation in primary elections, and guarantees the right to cast a meaningful vote to the independent voter far more completely than does the closed primary. Forsaking the open primary in the name of freedom of association, in addition to being self-contradictory, would resurrect a trend towards restriction of the franchise not seen since the days of the all-white primaries.

In determining whether or not a statute unconstitutionally deprives persons of freedom to associate, this court has devised a test in which the burdens imposed by the statute are balanced against the interests it serves. When the burden is substantial, the interests must be compelling. When the burden is less than substantial, the statute need only serve legitimate state interests; that is, minimal scrutiny is typically employed. And, where the party challenging the statute has not shown a substantial burden on association, the burden of persuasion to show a lack of a legitimate state interest rests with that party.

This court has consistently refused to hypothesize or

speculate upon possible burdens a statute might place upon freedom of association. The more absolute and the more clearly actually in operation a burden is, the more substantial it is. According to appellant's brief, the open primary infringes upon their freedom to associate in that it allows adherents of other parties to foist the weakest candidate off on them. However, appellant's brief contains no evidence that this "raiding" actually takes place. Indeed, the available evidence indicates that raiding, if it takes place at all, is of such inconsequential dimension as to have little, if any, effect on the outcome of an election. Any burden on freedom of association is trifling, if not wholly speculative. Under no circumstances can it be styled as substantial.

On the other hand, the interests served by the open primary are of the utmost import. The open primary protects the privacy of the citizen's political beliefs and affiliations. It preserves the independent voter's right to vote. It encourages thoughtful, discriminating voting and allows the voter to choose the candidate he thinks is best qualified. The interests served by the open primary are of the most enduring and fundamental nature. The burden allegedly imposed by the open primary on freedom of association is of the most conjectural and trivial nature. The open primary is constitutional.

ARGUMENT

I. Freedom of Association Is Served Better by an Open Primary Than by a Closed Primary.

It is ironic that the open primary should be attacked as an impermissible restraint on the freedom of citizens to associate with the political parties and candidates of their choice. It is doubly ironic that this attack should come from a party which in the past decade has made great strides in opening up its processes to full citizen participation.

The open primary emerged in the first part of this century as one of the most uncompromised expressions of

the drive toward citizen, rather than boss, control of the political processes. *See* Ranney, *Curing the Mischiefs of Faction* 18, 80-81 (1975). Where participation in a closed primary is restricted to party regulars, those who are fervent enough in their loyalty to a party publicly to enroll in that party, an open primary allows every voter to follow the dictates of his convictions, with no strings attached. Where the closed primary effectively disenfranchises those who do not want their political beliefs made a matter of public record, the open primary allows the citizen, if he so desires, to preserve the secrecy of his political beliefs, a right which surely lies at the core of any democratic system. Where the closed primary effectively denies the growing legion of independent voters any real voice in primary elections, the open primary grants the independent full access to the polls at this critical stage in the selection of those who will govern. And, finally, where those who stand most to benefit from the closed primary are a small group of party leaders and professionals desiring to solidify their power base, those who benefit from open primaries are, quite simply, concerned voters to whom partisan politics represents a chance to be heard but not a career.

The open type of primary thus preserves, to a much greater extent than does the closed primary, the freedom of citizens to associate for political purposes. It is, paradoxically enough, this open primary system which, in the name of freedom of association, is being assaulted in this action by proponents of the closed primary.

The ironies, however, do not stop at this point. Our research has disclosed no decision by this court which has overturned a state elections system because it allowed too much voter participation. Yet that is precisely what the appellants herein are demanding. Moreover, ever since the malignant all-white primary schemes of certain states were invalidated in the White Primary Cases, *see, e.g., Smith v. Allright*, 321 U.S. 649 (1944), the decisions of this court have described a trend toward ensuring full citizen participation in the electoral processes. A decision by this court that the First Amendment mandates adoption of the

restrictive closed primary, if any type of primary is to be had, would go far in reversing this laudable trend.

The long-range effects of the relief demanded by appellants must also be examined. If a state desiring to hold a primary may not prevent a political party from requiring enrollment as a prerequisite to participating in that primary, what is to prevent a party from requiring in addition a statement of allegiance to the party's principles or platform? The very notion of imposing ideological qualifications on the exercise of the franchise is abhorrent to every concept of democracy. Yet that is the Pandora's Box which a reversal of the decision below is bound to open.

To assert that the First Amendment requires discarding the open primary is to ignore the spirit of that Amendment, as well as the decisions construing it. Freedom of association is served much more fully by the open primary than by the closed primary.

II. Wisconsin's Open Primary Statute Does Not Impose a Substantial Burden on Appellant's Freedom of Association.

An analysis of whether Wisconsin's open primary unconstitutionally deprives appellants of their freedom to associate must begin with an examination of what, if any, burdens the open primary statute actually imposes on that right. This court has consistently looked for a "substantial burden" on associational rights before striking down state law. *See Marchioro v. Chaney*, 442 U.S. 191, 199 n.15 (1979); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975). Words like "substantial", however, are not written on litmus paper. The standards to be used in determining how substantial a burden Wisconsin's open primary actually places on freedom of association can best be gleaned by surveying other election statutes which have already been subjected to associational challenges.

A striking feature of election statutes which have

fallen on associational grounds is that the burden on association has been actual and direct. This court has consistently and rightly refused to speculate on or hypothesize possible burdens on association. For instance, the Ohio statutes stricken in *Williams v. Rhodes,* 393 U.S. 23 (1968), made it "virtually impossible" for a new party to be placed on the ballot in a presidential election. *Id.* at 24. The law which fell in *Kusper v. Pontikes,* 414 U.S. 51 (1973), "locked" the voter into his preexisting political affiliation in such a way that to change parties the voter had to forego voting in any primary for nearly two years. *Id.* at 61. A similar pattern may be seen in election statutes which have perished on the razor's edge of equal protection due to a disparate effect on, among other rights, the freedom to associate. See *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); and *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966). A common thread in all these defective statutes is that the burden imposed on association is actual, in that there is no question but that it exists, and absolute, in that a key component of association, voting or getting on the ballot, is denied. A commentator cast this point in even stronger language:

> "* * * associational analysis ordinarily has been applied when states have acted to deter individuals from joining or attending meetings of a group * * *"

Developments-Election Law, 88 HARV.L.REV. 1111, 1166 (1975).

In contrast to the above pattern are those election statutes which have survived freedom of association challenges. As in *Kusper v. Pontikes, supra,* the law challenged in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), prescribed a time limit within which a voter had to enroll in a party in order to vote for that party's candidates in a closed primary. Unlike the statute in *Kusper,* the *Rosario* statute was upheld. "The basic difference," this court said, "was obvious." The law in *Kusper* "absolutely precluded" the voter from participating in a primary. The law in Rosario did not. *Kusper v. Pontikes, supra* at 60. A similar

distinction was used in upholding the challenged statute in *Jenness v. Fortson,* 403 U.S. 431 (1971). Like the statute which succumbed in *Williams v. Rhodes, supra,* the law at issue in *Jenness* imposed requirements which third parties had to meet before getting on the ballot. The *Jenness* court concluded, however, without even discussing possible state interests, that "[w]e can find in this system nothing that abridges the rights of free speech and association * * *" *Jenness v. Fortson, supra* at 440. The distinction with *Williams* was simple: "* * * Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo." *Jenness v. Fortson, supra* at 438. The barrier to association in *Williams* was absolute; in *Jenness* it was not.

This survey of cases points out the elements which enter into a determination of whether a burden on associational rights is "substantial" or not. The more absolute and the more clearly actually in operation an infringement on association is, the more substance there is to it. Inversely, the more indirect and speculative an infringement is, the less substance it has. Indeed, *Jenness v. Fortson, supra,* seems quite plainly to stand for the proposition that if a burden on association, although actual, may be overcome through reasonable effort (and assuming the burden is rationally related to some legitimate state interest), the inquiry is over, and the burden is constitutional. *Id.* at 439-440.

The alleged burden placed by Wisconsin's open primary on the Democratic Party's ability to associate, when judged against the above standards, whithers away to something of very little substance indeed. According to Appellant's Brief, the burden on association lies in the fact that Wisconsin law allows voters who are not willing publicly to declare their fealty to the Democratic Party, that is, those who are not party regulars, to vote for a Democrat in the presidential primary. Brief for Appellant at 25-32. The Party quotes statistics purporting to show extensive participation in the Democratic primary in Wisconsin by so-called crossovers. Brief for Appellant at 30-31. What these statistics do not show, however, is the reason for the crossing over.

There are many reasons why a citizen wishing to vote for a Democrat may not be publicly affiliated with that party. First, the voter may be a strong Democrat who simply wants to keep his political beliefs a private matter. Or, he may be a strong Democrat who just hasn't gotten around to registering with the Party. The voter may be a non-Democrat who thinks that a Democratic candidate is best qualified. Or, finally, the voter could be an adherent of another party who wants to foist the weakest candidate off on the Democrats. In the first two situations, there is absolutely no infringement on any right to associate. Indeed, this right will be enhanced by ensuring that the Party hears the voice of all its adherents. The third situation represents little, if any, threat to association since each major party embraces such a wide range of opinion and a candidate who appeals to such relatively unattached voters may well be the stronger one. Ogden, *Washington's Popular Primary,* Research Studies of the State College of Washington, 148 (Sept. 3, 1951).

It is only in the last situation, the classic case of raiding, where an open primary could represent an actual and direct burden on association. The commentaries, and common sense, however, both indicate that raiding is a very rare phenomenon. First of all, raiding will, in all probability, only take place when the result in the raider's own primary is a foregone conclusion. One who is committed enough to party politics to raid will surely have a favorite in his own primary if there is any contest. The statistics back this up. In a state-wide poll conducted in Washington State by the Washington Public Opinion Laboratory, only 3 percent of those responding said they might engage in raiding. Ogden, *supra* at 147. This survey concluded that

> "[raiding] probably is rejected by the people * * * as a tactical weapon. * * * Statistical evidence * * * strongly indicates that [raiding] is not a weapon which has ever been used deliberately and successfully on a state-wide basis * * *"

Id. at 160. A more recent study confirms this conclusion:

> "Although there are documented cases of organized raiding [citing no cases after 1950], the recent decline of party machines capable of inducing their members to raid and the absence of durational requirements in many states suggest that the likelihood of raiding may be overstated."

Developments-Election Law, 88 HARV.L.REV. 1111, 1173 (1975).

Any burden imposed on freedom of association by an open primary is thus speculative, since no evidence of actual raiding has been proffered, and, far from absolute, since if any raiding does occur, it is so rare and of such trifling dimension as to have only a miniscule effect on the outcome of an election. A burden as ephemeral as this cannot, in light of the decisions of this court, be characterized as substantial.

III. The Open Primary Serves Sufficiently Important State Interests to Justify Its Negligible Impact on Freedom of Association.

This court has not developed any single, formulistic test for determining whether election laws unconstitutionally deprive citizens of their freedom to associate. When faced with statutes imposing severe burdens on the ability to associate, the court has required that the statutes serve a "compelling" state interest, *Williams v. Rhodes, supra* at 31, and that the means chosen to serve that interest be the least drastic alternative, *Kusper v. Pontikes, supra* at 59. However, where the burden is less severe, a more relaxed standard is employed. For example, in *Rosario v. Rockefeller, supra* at 762, the court required only that the burden on association be "tied to a particularized legitimate purpose, and [be] in no sense invidious or arbitrary." The rule of decision emerging from these cases was perhaps best summarized in *Storer v. Brown,* 415 U.S. 724, 730 (1974):

> "Decision in this context, as in others, is very much a 'matter of degree,' * * * very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the state claims to be

> protecting, and the interests of those who are disadvantaged by the classification.' "

Moreover, the *Storer* opinion suggests that, at least in cases where the burden placed on association is not as absolute or severe as in cases like *Williams v. Rhodes, supra,* or *Kusper v. Pontikes, supra,* the burden of persuasion will be placed on the party challenging the statute. That is the plain import of the *Storer* court's observation that

> "Nor do we have reason for concluding that the device California chose * * * was not an essential part of its overall mechanism to achieve its acceptable goals."

Storer v. Brown, supra at 736. Accord, Note, 53 N.C.L. REV. 430, 436-437 (1974).

The burden on association represented by an open primary is miniscule, p. 8-10, supra. Therefore, the open primary should be subjected to a very relaxed standard of scrutiny. *Storer v. Brown, supra* at 736. Indeed, *Jenness v. Fortson, supra* at 440, suggests that such a light burden will survive if shown to be rationally related to a legitimate state interest. An open primary statute more than meets that standard.

As summarized in Part I. of this brief, the interests served by an open primary lie close to the core of our democratic system.

> "This court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * compelled disclosure of affiliation with groups engaged in advocacy may constitute [an effective] restraint on freedom of association * * *"

NAACP v. Alabama, supra at 462. In an open primary, the voter is not compelled to disclose his affiliation with a party before he is allowed to vote for that party's candidate. Thus, the open primary protects the privacy of one's political beliefs, an interest central to our democratic system. The closed primary, on the other hand, faces the voter with the Hobson's choice of disclosing political affiliations which he might rather keep private, or not voting at all. The open primary serves the vital state

interest of preserving the secrecy of the ballot. The closed primary only compromises that interest.

The second great interest served by an open primary is the preservation of the right to vote of the independent voter. This court recognized as far back as 1973 that

> "[p]artisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates."

Rosario v. Rockefeller, supra at 771. (Powell, dissenting). The Presidential campaign of 1980 has driven home even more clearly the increase in the number of independent voters. Accord, Comment, 1977 So.Ill. L.J. 210, 232. In a closed primary the independent cannot even vote unless he publicly declares himself to be something he is not, a party adherent. If the independent declines to engage in such a falsehood and if the general election is uncontested (something which does not happen in Presidential races but which is far from rare on the state and local level), the independent will be totally disenfranchised. And, even if the general election is contested, the independent still will be shut out at the primary election, which this court has deemed just as critical a stage as the general. See *U.S. v. Classic*, 313 U.S. 299, 318 (1941). The right to vote is "a fundamental political right * * * preservative of all rights." *Dunn v. Blumstein, supra* at 336. An open primary guarantees that right, and the right freely to associate, to the independent voter to an extent the closed primary cannot come near. If any state interests may be deemed compelling or vital, these are surely two.

Two other less important, but certainly legitimate interests served by the open primary are that it encourages thoughtful, discriminating voting and allows the voter, at least to a greater extent than does the closed primary, to vote for the candidate who best reflects his views. See *Rosario v. Rockefeller, supra* at 769 (Powell, dissenting).

The open primary not only enhances the seminal interests of freedom of association and the right to vote, but does so in concert with one of the central balances of

our federal system. The prime responsibility for the regulation of federal elections is vested in the states.[1] See *Williams v. Rhodes, supra* at 29; and *Storer v. Brown, supra* at 729, 730.

The states have exercised this authority to regulate elections by evolving

> "comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."

Storer v. Brown, supra at 730. The open primary represents the exercise by the states of one of their critical functions under our federalism in a way which enhances freedom of association, a constitutional limitation on state action. The open primary shows that federalism works. It must not be discarded.

To a much greater extent than does the closed primary, the open primary protects freedom of association and the right to vote, state interests of a most momentous weight. The burden placed on freedom of association by the open primary is negligible. Under the balancing test developed by this court, the open primary is constitutional. *See* 88 HARV.L.REV., *supra* at 1210.

IV. The Open Primary Is Consistent With the Result in *Cousins v. Wigoda.*

The appellants assert that *Cousins v. Wigoda, supra,* of itself, is dispositive of this entire case and requires that the open primary be scrapped. (Brief for Appellant at 20). Judicial decisions are not made in a vacuum and should not be so read. *Cousins* is but one case in a well-developed body of law relating to associational challenges to election laws. As demonstrated up to this point, the open primary is consistent with this body of law. Appellants, however,

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[1]It need hardly even be mentioned that the nearly exclusive authority to regulate *state* elections is vested in the states. See, 88 HARV. L. REV., supra at 1210-1211.

would have the court read *Cousins* as the death knell of the open primary: an interpretation radically at odds with the mainstream of this fund of decisions. Such a strained reading should be avoided. *Cousins* must be read as complementing its forebears, rather than revolutionizing them.

The *Cousins* opinion "emphasized" that its holding related only to "the qualifications and eligibility of delegates." *Cousins v. Wigoda, supra* at 483 n. 4. Delegate "qualifications and eligibility" is potentially a very broad field which could be affected by nearly any election regulation a state chose to adopt. However, the type of delegate qualifications actually at issue in *Cousins* were of a very circumscribed sort. The party guidelines which were found to take precedence over state law required written rules to be in effect, adequate public notice and participation in slate-making, a certain timing of delegate selection, and better representation of women and minority groups. See *Id.* at 479 n. 1, and Hearing Officer's Report, Democratic Nat'l Party, June 25, 1972. These guidelines dealt with the processes by which the individual persons who might serve as delegates were chosen. They did not deal with the mechanism by which the delegation most responsive to the will of the voters would be chosen, the function of the open primary. *Cousins* is simply not on point in an analysis of the open primary. As a commentator has stated,

> "*Cousins* should not * * * be read necessarily to invalidate state regulation of the procedures by which parties select candidates for state office or delegates to the national conventions."

88 HARV.L.REV., *supra* at 1210.[2] Moreover, if *Cousins* has any relevance here, it is in support of the open primary:

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[2] *Cousins'* inapplicability to primary elections for state office is even more certain:

> "* * * *Cousins* should not be read to upset earlier state court decisions requiring state parties to conform to state laws regulating the nomination of candidates for state office * * *"

88 HARV.L.REV., *supra* at 1211.

> "[t]he Democratic Party's 1970 guidelines [those at issue in *Cousins*] were promulgated as an expression of the ideological decision to broaden the participation in the nomination process * * *"

Note, 62 GEO. L.J. 1621, 1630 (1974). That is precisely one of the key aims of an open primary.

Furthermore, "[t]he emphasis in *Cousins* was on the interstate implications of the Illinois statutes." Note, 14 WILLAMETTE L.J. 259, 266 (1978). The court wanted to avoid the crazy-quilt result from giving each state a veto power over a national party's internal policy decisions, such as the decision to expand its base. *Cousins v. Wigoda, supra* at 490. The argument that the open primary would open a similar Pandora's Box would apply only in Presidential elections, and then only if raiding was shown to be systematic and widespread. The evidence, however, indicates just the contrary.

Finally, and most simply, *Cousins* may be distinguished here in the same manner in which it was distinguished in *Marchioro v. Chaney, supra* at 199 n. 15. In *Cousins* there was a substantial burden on the party's associational freedoms. Here there is none.

The considerations which informed this court's decision in *Cousins*, then, do not apply to an open primary. *Cousins* may most easily be read, consistently with the other cases discussed herein, as permitting an open primary.

CONCLUSION

The First Amendment's guarantee of freedom of association cannot be read to require the invalidation of the open primary, a type of primary which enhances that very freedom to a far greater degree than does the closed primary. In addition to being logically inconsistent, an invalidation of the open primary on associational grounds would needlessly upset a central balance of our federal system and would resurrect a trend toward restricting the franchise, a trend which has not been seen since before the demise of the all-white primaries decades ago.

Wisconsin's open primary imposes at most a speculative and inconsequential burden on freedom of association. The open primary enhances freedom of association to a vastly greater degree than it burdens that freedom. The other interests served by the open primary, such as protecting the right to vote, are also vital to the smooth running of a democratic system. Under the balancing test developed by this court, it could soundly be argued that an open type primary is required by the First Amendment. At the very least, the open primary is permitted by that Amendment.

The decision below of the Supreme Court of Wisconsin should be affirmed.

Respecfully submitted,

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